No. 01-569

Supreme Court, U.S.
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In The

Supreme Court of The United States

KATHY LYON, AARON J. LYON and THE ESTATE OF DAVID LYON and BELINDA POLLACK, HANNA MARIE POLLACK, RENEE STEVEN POLLACK, and THE ESTATE OF STEVEN POLLACK,

Petitioners,

- vs. -

AGUSTA S.P.A., AGUSTA AEROSPACE CORPORATION, SESTO CALENDE WORKS OF AGUSTA and SIAI MARCHETTI CORPORATION,

Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT
(RULE 29(6).

Defendants are instrumentalities of a foreign government and own no interest in a domestic corporation. Agusta S.p.A., a party defendant, is incorporated under the laws of Delaware.

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STATEMENT OF THE CASE

Defendant Marchetti manufactured a SIAI Marchetti aircraft identified as Model F-260, bearing serial number 2 - 46 (the "subject aircraft"). On December 17, 1970, Appellee Marchetti sold and directly delivered the subject aircraft to its first purchaser, S.A. Sabena N.V., the Belgian Airline ("Sabena").

Almost twenty-three years after the initial sale of the aircraft, on November 26, 1993, the subject aircraft crashed at or near 325 Bay Street, Santa Monica, California. The subject aircraft's three occupants, Roy Belzer, Steven S. Pollack and David Lyon, died as a result of the accident.

GARA, which became effective on August 17, 1994, creates an 18-year statute of repose applicable to personal injury, wrongful death or property damage claims against general aviation manufacturers and arising out of an accident involving a general aviation aircraft. It expressly provides that no civil action for death arising out of a general aviation aircraft accident may be maintained against the aircraft manufacturer if the accident occurred eighteen (18) years after either: a) the aircraft's delivery date to its first purchaser or lessee, if delivered directly from the manufacturer, or b) the aircraft's first delivery date to a person engaged in the business of selling or leasing such aircraft. 49 U.S.C. § 40101.

On November 17, 1994, nearly three (3) months after the GARA was enacted and came into effect, Plaintiffs commenced the instant wrongful death actions. On or about December 8, 1994, Plaintiffs filed a first amended complaint asserting claims for strict product liability and

negligence for wrongful death against Agusta and Marchetti. On or about August 10, 1995, Defendants filed an answer asserting the GARA defenses.

Defendants' original motion to dismiss was heard by the District Court on October 30, 1995. The District Court's written Order regarding Defendants' original motions to dismiss was issued on December 1, 1995. At the hearing on Defendants' motion to dismiss Defendants' first amended complaint, the District Court recognized the GARA includes a limitation period of 18 years and concluded Plaintiffs' actions are subject to the GARA-imposed limitations. Defendants' motion to dismiss was granted without prejudice.

As a result of the instant aircraft accident, three separate actions were commenced against Defendants by the decedents' heirs. Of the three, one action on behalf of Belzer was timely filed before the enactment of GARA. Notably, *Belzer v. Agusta S.p.A.*, No. CV 94-3156-CBM (D. Cal. April 19, 1999) was adjudicated to final judgment. At the *Belzer* trial, the District Court Judge made certain findings of facts and conclusions of law. The District Court found that no cause of action existed with respect to the occurrence of the subject accident and that the Defendants were indeed "Foreign Sovereigns." As such, the District Court found in favor of the Defendants.

REASONS FOR DENYING THE PETITION

The Petition should be denied because GARA does not violate any constitutional provisions or notations of due process or equal protection. The legislation was enacted in response to a decline in the already depressed field of aviation. The enactment of GARA bears a rational relationship to the achievement of a legitimate governmental objective. The legislative history and congressional testimony support this position. Furthermore, there is absolutely no evidence that the effect of GARA is to distinguish between two classes of plaintiffs.

A. GARA Does Not Violate Due Process And Its Application Is Fully Consistent With The Fifth Amendment

To establish a due process claim, the Plaintiffs must show the deprivation of a protected property or liberty interest. *See, e.g., Burnsworth v. Gunderson*, 179 F.3d 771, 774 (9th Cir. 1999). GARA does not deprive these Plaintiffs or any other person of any protected property or liberty interest.

On August 17, 1994, President Clinton signed the GARA into law, creating an 18-year statute of repose applicable to personal injury, wrongful death or property damage claims against general aviation manufacturers and arising out of an accident involving a general aviation aircraft. The GARA, which amends the Federal Aviation Act of 1958, took effect on the date of enactment, August 17, 1994, and applies only to civil actions commenced after August 17, 1994.

GARA expressly provides no civil action for death arising out of a general aviation aircraft accident may be maintained against the aircraft manufacturer if the accident occurred eighteen (18) years after either: a) the aircraft's delivery date to its first purchaser or lessee, if delivered directly from the manufacturer, or b) the aircraft's first delivery date to a person engaged in the business of selling or leasing such aircraft. 49 U.S.C. § 40101.

Although only a handful of cases have discussed the applicability of GARA, no case has raised an issue concerning its constitutionality. *See, e.g., Wright v. Bond-Air, Ltd.*, 930 F. Supp. 300 (E.D. Mich. 1996; *Rickert v. Mitsubishi Heavy Indus., Ltd.*, 929 F. Supp. 1453 (D. Wyo. 1996).

Plaintiffs attempt to formulate an argument, alleging that the GARA violates due process and equal protection. Given that the GARA embodies Congress' rationally based economic policy judgment, Plaintiffs' challenges to a statute presumed constitutional are without merit and the District Court's dismissal of Appellants' complaints should be affirmed. *See Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978); *Int'l Union v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976); and *School Dist. No. 1J of Multnomah County v. ACandS, Inc.*, 5 F.3d 1255 (9th Cir. 1993) *cert. denied*, 512 U.S. 1236 (1994).

There is no doubt that there are significant differences between statutes of repose as compared to statutes of limitation. Unlike statutes of limitation, which are procedural in nature, statutes of repose are substantive, and begin to run from an event's occurrence, here the initial

distribution and sale of aircraft, which is wholly unrelated to a cause of action's accrual. A statute of repose is engrafted onto the substantive right created by law, and makes a substantive part of Appellants' cause of action the requirement that suit be filed within a specified time. *Goad v. Celotex*, 831 F.2d 508 (4th Cir. 1987); *School Dist. No. 1J of Multnomah County*, 5 F.3d 1255 (9th Cir. 1993) *cert. denied*, 512 U.S. 1236 (1994). A statute of repose runs from the date of substantial completion or abandonment of occurrence, without regard to the occurrence of any actual loss or injury. GARA provides a rolling 18 year statute of repose.

Despite these obvious differences, Plaintiffs based their entire argument regarding GARA's violation of due process on the interchangeability of statutes of repose and statutes of limitations. The fatal defect in Plaintiffs' reasoning is that the crucial differences between a statute of limitations and a statute of repose with respect to retroactive application has been specifically acknowledged. Contrary to Plaintiffs' reliance on precedent concerning statutes of limitations issues, the Ninth Court has found such decisions and reasoning inapplicable to statutes of repose. *See School Dist. No. 1J of Multnomah County*, 5 F.3d 1255 (9th Cir. 1993) *cert.denied*, 512 U.S. 1236 (1994).

In upholding the statute of repose in *School Dist. No. 1J*, the Ninth Circuit found "a permissible constitutional legislative function to balance the possibility of outlawing legitimate claims against the public need that at some definite time there be an end to potential litigation." Id.

Statutes of repose have consistently withstood constitutional challenges. *See, e.g., Alexander v. Beech Aircraft Corp.*, 952 F.2d 1215 (10th Cir. 1991) (Indiana statute of repose found constitutional); *Eddings v. Volkswagenwerk, A.G.*, 835 *F.2d 1369 (11th Cir.), cert. denied*, 488 U.S. 822 (1988) (upholding Florida's 12-year products liability statute of repose against a 14th amendment due process and equal protection challenge); *Bowman v. Niagara Machine and Tool Works, Inc.*, 832 F.2d 1052 (7th Cir. 1987) (upholding the constitutionality of Indiana's 10 year products liability statute of repose against a 14th amendment equal protection challenge); *Barwick v. Celotex Corp.*, 736 F.2d 1362 (6th Cir. 1984) (Ohio statute of repose); *Mathis v. Eli Lilly and Co.*, 719 F.2d 134 (6th Cir. 1983) (upholding the constitutionality of Tennessee's 10-year limitation period for product liability actions against a fourteenth amendment due process challenge); *Wayne v. Tennessee Valley Authority*, 730 F.2d 392 (5th Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985) (same).

This Court has held that a person has no property right or vested interest in any common law rule, and that the Constitution does not forbid abolition of common law rights to obtain a permissible legislative purpose, despite the fact settled expectations are upset. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 87 (citing *Second Employers' Liability Cases*, 223 U.S. 1 (1912)); *Silver v. Silver, 280 U.S. 117 (1929); W.J. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).*[1]

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[1] Notably, given that a common law property right vests only upon entry of judgment, plaintiffs do not have standing to contest the GARA's constitutional validity anyway. See

Accordingly, the Supreme Court has found no violation of the Fourteenth Amendment by similar statutes of repose. *See e.g., Ellerbe v. Otis Elevator Co.*, 459 U.S. 802 (1980), *dismissing appeal from* 618 S.W.2d 870 (Tex. Civ. App. 1981) (due process of law not denied to plaintiff by virtue of statute prohibiting suits against licensed engineers or architects for damages arising out of unsafe condition of real property that was improved more than ten years earlier) (appeal dismissed for lack of a substantial federal question).

Even if Plaintiffs were deprived of a property or liberty interest, retroactively applying GARA would not contravene the Due Process Clause. In fact, it is well established that Congress has considerable latitude to retroactively legislate. *Landgraf v. USI Film Prod.*, 511 U.S. 244, 272 (1994).

The Due Process Clause is satisfied "by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Oregon-Washington Carpenters' Employers' Pension v. R.A Gray and Co*, 467 U.S.717, 730 (1984). In this instant, it was rational for Congress to enact the GARA and to apply that statute to Plaintiffs' accrued causes of action.

Plaintiffs have continuously requested that the court should judicially legislate a grace period for filing suits for accidents that occurred prior to the enactment of GARA. No authority for this proposition has been cited. In fact,

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infra, pp. 21-22; *see also Grimesy v. Huff*, 876 F.2d 738 (9th Cir. 1989) *cert. denied*, 499 U.S. 975 (1991).

the clear wording of the statute explicitly provides otherwise.

Plaintiffs' attempt to buttress their request for a "reasonable" time to file suit beyond the GARA's enactment by alleging "constitutional infirmities" ignores legal precedent upholding Congress' economic policy decisions.

B. GARA Does Not Violate Equal Protection

> The equal protection clause does not prohibit legislative classification and imposition of statutory restraints on one class which are not imposed on another. The classification is constitutionally infirm only if it bears no rational relationship to the achievement of a legitimate [governmental] objective. . . A statutory discrimination will not be set aside as a denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it.

Westlands Water Dist. v. Amoco Chemical Co., 953 F.2d 1109 (9th Cir. 1992) (citing *McAllister v. South Coast Air Quality Management Dist.*, 183 Ca. App. 3d 653, 659, 228 Cal. Rptr. 351, 355 (1986)).

The appropriate standard with which to evaluate whether statutes of repose violate equal protection is the rational relationship test: a statutory classification will not be set aside if "any state of facts reasonably may be conceived to justify it." *Dandridge, Jr. v. Williams*, 397

U.S. 471, 485 (1970) (quoting *McGowan v. Maryland*, 366 U.S. 420, 426 (1961)). In fact, the Supreme Court has made it clear that statutory classifications will be set aside as violative of equal protection only if no grounds can be conceived to justify them as *United States v. Lee*, 957 F.2d 778, 782 (10th Cir. 1992).

Equal protection challenges against statutes of repose have been largely unsuccessful, predominantly because of the permissible legislative objectives in enacting such statutes. *See, e.g., Eaton v. Jarvis Prod. Corp.*, 965 F.2d 922 (10th Cir. 1992) (upholding the constitutionality of a statute of repose challenged on equal protection grounds, where the classification was designed to protect certain manufacturers from open-ended and uncertain liability for equipment); *Love v. Whirlpool Corp.*, 264 Ga. 701, 449 S.E.2d 602 (1994) (holding statute of repose constitutional under "rational basis" test, where statute was rationally related to legitimate government interest in remedying insurance industry problems generated by open-ended liability of manufacturers); *Pullman v. Cincinnati*, 476 So. 2d 657 (Fla. Sup. Ct. 1985) (holding statute of repose constitutional on equal protection grounds because the legislature reasonably decided that perpetual liability places an undue burden on manufacturers).

Although Plaintiffs unsuccessfully challenged the District Court to articulate a rational basis in support of the legislation, a clear reading of the statute and its legislative purpose counter defy any plausible challenge. The permissible legislative purposes behind the GARA were amply noted in the Congressional debates (Volumes 139 and 140).

It is a well-settled principle that property rights in a civil action do not vest until the entry of final money judgment. *Grimesy v. Huff*, 876 F.2d 738, 743-44 (9th Cir. 1989) *cert. denied*, 499 U.S. 975 (1991). Because Plaintiffs in this case have not obtained a final judgment, they have no property interest in their cause of action. An attempt to argue otherwise is clearly frivolous.

Plaintiffs have misunderstood the correct equal protection analysis. They allege that since their case involves two groups of potential plaintiffs different than the groups of potential plaintiffs in other statute of repose cases, these cases do not apply to their case. This is incorrect, as the standard remains the same unless the group treated differently by the statute is a suspect class, irrespective of which classes of people are treated differently. As the plaintiffs in this case are not a suspect class, nor do they allege that they are a suspect class, all other decisions concerning the constitutionality of statutes of repose with respect to equal protection are clearly applicable in the present case.

In support of this challenge, Plaintiffs dispute the Ninth Circuit's discussion and ultimate reliance upon *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S.Ct. 2773 (1991) *and Gray v. First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993).

In *Lampf*, this Court declared a uniform statute of limitations for federal securities fraud claims under section 10(b) of the 1934 Act, 15 U.S.C. § 78j (b). *Lampf*, 501 U.S. 350, 352, 111 S.Ct. 2773, 2782. This Court retroactively applied its new rule to the parties in *Lampf* and dismissed the claims as untimely. *Id.* Challenges made on separation of powers, equal protection and due process

grounds were rejected. In sum, *Lampf* announced that for cases filed after the date legislated by Congress, courts must apply the new uniform statute of limitations. This Court noted as should be done here, that such a distinction in time limitations is rationally related to Congress's objective. Congress is not obligated to aid every potential litigant who may have been harmed by the change in the law following *Lampf*. *Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567, 1574 (11th Cir. 1992).

The *Henderson* court further supported the rationale behind the *Lampf* decision by stating:

> It is irrational for Congress to limit its remedy to those individuals who have gone so far as to file suit in reliance upon the existing statute of limitations. These individuals will suffer the most concrete injury because they have expended significant time and effort to bring their action, not to mention substantial funds for attorneys' fees and court costs.

Henderson, 971 F.2d 1567, 1574.

The same analysis should be applied in the instant matter. GARA was enacted by Congress to aid a depressed aviation industry. GARA operated to bar actions that had not yet been filed at the time of its enactment. Similar to *Lampf*, GARA passes constitutional muster, amply surviving rational basis scrutiny. Gray, 989F.2d at 1574. As was done in GARA, Congress rationally can, and did, offer special protection to those who had already filed their actions. (App.20).

In effect, Plaintiffs challenge the ultimate enactment of the GARA; a challenge which must continue to fall on deaf judicial ears. By advocating an enlargement of time under GARA, Plaintiffs are requesting the Court to judicially legislate that, which is not possible.

As explained by this Court, absent a violation of a specific Constitutional provision prohibiting retroactive statutes, "the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to failed to give a statute its intended scope." *Landgraf*, 511 U.S. at 1498. In fact, this Court recognized that "retroactivity provisions often serve entirely benign and legitimate purposes . . . [such as] to give comprehensive effect to a new law Congress considers salutary." *Id.* Thus, where there is clear Congressional intent for a statute to be applied retroactively, courts cannot construe and statute to apply prospectively, absent a Constitutional violation. Plaintiffs' argument, therefore, necessarily fails.

Since the enactment of GARA, there have not been any successful allegations showing that the GARA uses a suspect classification or impinges upon a fundamental right. If a statute is rationally related to the achievement of legitimate governmental ends, then it must be upheld. *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 408, 102 S.Ct. 1137, 1141 (1982). There are simply no implications of fundamental rights with the GARA.

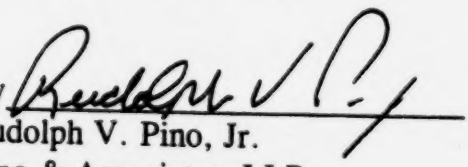
The policy reasons in support of GARA clearly fit within the guidelines of permissible legislative purpose, making GARA constitutionally unassailable. Congress'

studied choice to enact the statute of repose was rationally related to legitimate legislative economic concerns.

CONCLUSION

The Petition for a Writ of *Certiorari* lacks merit since there is ample legislative support that Congress's intent in enacting GARA was rationally related to the achievement of a legitimate governmental objective. As evident by the lack of case law, any challenges based on violation of due process or equal protection must necessarily fail. It is therefore respectfully requested that the Petition for a Writ of *Certiorari* be denied.

Respectfully submitted,



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